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No. 97-1649

In the Supreme Court of the United States

OCTOBER TERM, 1997

STEPHEN A. ARNESON, PETITIONER

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Back Pay Act waives the sovereign immunity of the United States against prejudgment interest on a back pay award under the Rehabilitation Act.

2. Whether the Rehabilitation Act waives the sovereign immunity of the United States against tax enhancement damages that compensate a plaintiff for the tax consequences of receiving back pay in a lump sum rather than as a yearly salary.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 51a-60a) is reported at 128 F.3d 1243. The opinion of the district court (Pet. App. 43a-50a) is reported at 958 F. Supp. 443.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1997. On January 28, 1998, Justice Thomas extended the time within which to file a petition for certiorari to and including April 6, 1998. The petition for certiorari was filed on April 6, 1998, and was placed on this Court's docket on April 9, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in employment decisions by the federal government. 29 U.S.C. 791; *Lane* v. *Peña*, 518 U.S. 187, 192-194 (1996). The Rehabilitation Act does not contain its own remedial provisions for claims against the United States. Instead, the statute incorporates the "remedies, procedures, and rights set forth in [Title VII] of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k)." 29 U.S.C. 794a(a)(1).

Title VII provides that a court that finds that an employer has violated the statute may enjoin the violation and "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay" or "any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g)(1). The statute further provides that back pay may not be awarded for any period of time earlier than two years before the date the employee filed a complaint with the relevant agency. See *ibid.*

2. The Social Security Administration (SSA) hired petitioner Stephen A. Arneson in March 1968. Pet. App. 15a. In 1975, petitioner became aware that he suffers from apraxia, a neurological disorder. *Ibid.* Because of his apraxia, petitioner is easily distracted and has trouble concentrating. *Id.* at 16a. Petitioner also has problems understanding spoken and written language and has "poor handwriting skills, poor reading skills and poor organizational skills." *Ibid.*

The SSA made efforts to accommodate petitioner's disability, and, until early 1982, petitioner received satisfactory performance reviews. Pet. App. 16a-17a.

In 1982, however, the SSA informed petitioner several times that his work was unsatisfactory. *Id.* at 17a. In October 1982, the agency advised petitioner to apply for voluntary disability retirement and warned him that, if he failed to do so, he would be discharged. *Ibid.* Petitioner did not apply for voluntary retirement, and the SSA terminated petitioner's employment, effective January 21, 1983, citing approximately 75 instances of unsatisfactory performance. *Ibid.*

3. Petitioner then filed this action, alleging that the SSA violated the Rehabilitation Act when it terminated him. Pet. App. 17a. After holding a trial, the district court entered judgment for the government. *Id.* at 1a-14a. The Eighth Circuit reversed and remanded, directing the district court to consider whether the SSA reasonably could have further accommodated petitioner's apraxia. *Id.* at 15a-27a. On remand, the district court entered judgment in favor of the government. *Id.* at 28a-37a. The court of appeals again reversed, held that petitioner should be reinstated with back pay, and directed the district court to "take evidence on and enter judgment for the amount [of back pay] to be established." *Id.* at 42a.

a. On remand, the district court held that the Back Pay Act of 1966, 5 U.S.C. 5595 *et seq.*, waived sovereign immunity for prejudgment interest accruing from January 21, 1983, on petitioner's back pay award under the Rehabilitation Act; granted an additional award to compensate petitioner for the tax consequences of receiving his back pay in a lump sum; and refused to deduct from the back pay award the Civil Service Retirement System (CSRS) disability retire-

ment benefits that petitioner received during the period of his termination. Pet. App. 43a-50a.[1]

The court held that petitioner is entitled to prejudgment interest on his Rehabilitation Act back pay award because his claim falls within the scope of the Back Pay Act. Pet. App. 44a-46a. Although the court acknowledged that the Rehabilitation Act "does not address the issue of prejudgment interest," and that the waiver of sovereign immunity against interest in the Civil Rights Act of 1991 does not apply retroactively to petitioner's case, it held that the Back Pay Act supplements the relief available under the Rehabilitation Act by waiving the federal government's sovereign immunity against prejudgment interest. *Id.* at 44a-45a. Second, the court held that petitioner was entitled to an enhancement of his back pay award to compensate for the adverse tax consequences caused by receiving his back pay in a lump sum. The court relied on its "wide discretion in fashioning remedies to compensate victims of discrimination." *Id.* at 47a. The court thus awarded petitioner a tax enhancement of $117,803. *Id.* at 48a. The government timely appealed the district court's order and judgment to the Eighth Circuit.

b. The court of appeals reversed in part and affirmed in part. Pet. App. 51a-60a. The court held that the Back Pay Act does not waive sovereign immunity against interest on Rehabilitation Act back pay awards. *Id.* at 52a-56a. The court observed that the

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[1] We do not discuss in this brief in opposition to the petition whether the district court and court of appeals erred by refusing to deduct petitioner's CSRS benefits from his back pay award. See Pet. 9 n.4. That issue has been resolved by a settlement agreement.

Rehabilitation Act "expressly incorporates the 'remedies, procedures and rights' of Title VII" of the Civil Rights Act of 1964. *Id.* at 53a (quoting 29 U.S.C. 794a(a)(1)). And, until November 21, 1991—the effective date of the Civil Rights Act of 1991—Title VII did not waive the government's sovereign immunity against prejudgment interest. See *id.* at 53a-54a (citing *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986)).

Noting that "[i]n this Rehabilitation Act case, [petitioner] recovered back pay under Title VII's remedial provisions" and "did not rely upon the Back Pay Act to recover back pay," the court rejected petitioner's argument that the Back Pay Act contained the requisite waiver of sovereign immunity for interest accruing prior to November 21, 1991. Pet. App. 56a. The court ruled that, under this Court's precedent, the Back Pay Act, which "does not even mention Title VII or the Rehabilitation Act," fails to "expressly and unambiguously waive the federal government's sovereign immunity from interest awards under the Rehabilitation Act or Title VII." *Ibid.* To the contrary, the Back Pay Act provides only that interest is available on "amount[s] payable under paragraph (1)(A)(i)" of the Back Pay Act itself. *Ibid.* The court therefore reversed the district court's decision that petitioner was entitled to prejudgment interest before the effective date of the Civil Rights Act of 1991. *Ibid.*

The court also ruled that the Rehabilitation Act does not waive the sovereign immunity of the United States against tax enhancement damages. Pet. App. 57a. The court reasoned that "[n]owhere within the statutory framework of the Rehabilitation Act or Title VII, has Congress expressly waived sovereign

immunity from tax enhancement damages." *Ibid.* As the court explained, "[t]he mere fact that Congress intended that discrimination victims receive a full measure of back pay does not amount to an unequivocal and express waiver of sovereign immunity." *Ibid.* The court of appeals thus reversed the district court's award of a tax enhancement. *Ibid.*

ARGUMENT

The court of appeals correctly held that the federal government's sovereign immunity bars both prejudgment interest on a back pay award under the Rehabilitation Act and any award for tax enhancement damages. Contrary to petitioner's contention, there is no conflict between the holding of the Eighth Circuit in this case and the holding of any other court of appeals. Any difference in approach that may exist concerning the propriety of prejudgment interest on back pay awards under Title VII and the Rehabilitation Act is of no continuing importance, because Congress amended Title VII in 1991 to authorize prejudgment interest.

I. THE COURT OF APPEALS CORRECTLY HELD THAT SOVEREIGN IMMUNITY BARS BOTH THE PREJUDGMENT INTEREST AND THE TAX ENHANCEMENT DAMAGES SOUGHT BY PETITIONER IN CONNECTION WITH HIS BACK PAY AWARD UNDER THE REHABILITATION ACT.

A. The Back Pay Act Does Not Waive Sovereign Immunity For Interest On Awards Under The Rehabilitation Act

1. The court of appeals correctly held that the Back Pay Act does not waive the sovereign immunity of the United States with respect to interest on back pay awards under the Rehabilitation Act. As this Court has often held, "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text * * * and will not be implied." *Lane* v. *Peña*, 518 U.S. 187, 192 (1996). Moreover, when there are "plausible" readings of a statute that would not authorize monetary relief against the government, "a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992).

That rule of strict construction applies with even greater force in cases involving awards of interest. This Court noted and reaffirmed the "no-interest rule" in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), when it held that Title VII (before enactment of the Civil Rights Act of 1991) did not waive the government's sovereign immunity with respect to interest. The Court explained, "[t]he no-interest rule provides an added gloss of strictness upon these usual rules [that waivers of sovereign immunity must be

strictly construed in favor of the sovereign]." *Id.* at 318.

Although the present case arises under the Rehabilitation Act, *Shaw* applies with equal force here, because the Rehabilitation Act expressly incorporates Title VII's remedial scheme. 29 U.S.C. 794a(a)(1). Thus, prior to 1991, interest awards against the federal government were unavailable under the Rehabilitation Act.

In the Civil Rights Act of 1991, Congress amended Title VII to waive the sovereign immunity of the United States for interest. Section 114 of the Act provides that, in Title VII actions against the federal government, "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." Pub. L. No. 102-166, 105 Stat. 1079 (codified at 42 U.S.C. 2000e-16(d)). Congress did not, however, make that provision retroactive to allow for interest accruing before November 21, 1991, the effective date of the statute.[2] Thus, no interest was available to petitioner under the Rehabilitation Act for the period before November 21, 1991.

2. Petitioner contends that a separate statute—the Back Pay Act—provides the requisite waiver of sovereign immunity, but he is mistaken. The plain language of the Back Pay Act makes clear that its

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[2] Every court of appeals that has addressed the issue since this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), has held that Section 114 does not apply retroactively. See *Brown* v. *Secretary of Army*, 78 F.3d 645, 654 (D.C. Cir.), cert. denied, 117 S. Ct. 607 (1996); *Woolf* v. *Bowles*, 57 F.3d 407, 410 (4th Cir. 1995); *Edwards* v. *Lujan*, 40 F.3d 1152, 1154 n.1 (10th Cir. 1994), cert. denied, 516 U.S. 963 (1995); see also *Huey* v. *Sullivan*, 971 F.2d 1362, 1365-1366 (8th Cir. 1992) (pre-*Landgraf*), cert. denied, 511 U.S. 1068 (1994).

waiver of sovereign immunity for interest does not extend to back pay awards under the Rehabilitation Act. Rather, the Act authorizes interest only on back pay awards made under the Back Pay Act itself: "An amount payable *under paragraph (1)(A)(i) of this subsection* shall be payable with interest." 5 U.S.C. 5596(b)(2)(A) (emphasis added).[3]

As the court of appeals recognized, "[i]n this Rehabilitation Act case, [petitioner] recovered back pay under Title VII's remedial provisions. He did not rely upon the Back Pay Act to recover back pay[.]" Pet. App. 56a. Although petitioner sought *interest* under the Back Pay Act (see Pl. Post-Hearing Memo at 7-8), he did not seek, nor did he receive, *back pay* under the Back Pay Act. In fact, petitioner did not even

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[3] Subsection (b)(1)(A)(i) provides in relevant part:

> An employee of an agency who * * * is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay * * *
>
> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect —
>
> (i) an amount equal to all or any part of the pay * * * which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period.

5 U.S.C. 5596(b)(1)(A)(i).

mention the Back Pay Act until after he had been awarded back pay.[4]

3. Moreover, even if petitioner had sought back pay under the Back Pay Act, he could not have prevailed. The Rehabilitation Act provides the exclusive judicial remedy for federal employees alleging employment discrimination based on disability. *Johnson* v. *United States Postal Service*, 861 F.2d 1475, 1477 (10th Cir. 1988), cert. denied, 493 U.S. 811 (1989); *Gardner* v. *Morris*, 752 F.2d 1271, 1278 (8th Cir. 1985); *Boyd* v. *United States Postal Service*, 752 F.2d 410, 413 (9th Cir. 1985); *McGuiness* v. *United States Postal Service*, 744 F.2d 1318, 1321-1322 (7th Cir. 1984).

Congress designed Title VII as the exclusive judicial remedy for federal employees complaining of employment discrimination. And Congress similarly designed the Rehabilitation Act as the exclusive judicial remedy for federal employees claiming discrimination based on disability. Indeed, the Rehabilitation Act incorporates Title VII's comprehensive remedial scheme "as the exclusive vehicle for judicial remedy of claims of discrimination in federal employment." *Gardner*, 752 F.2d at 1278. As this Court has held, monetary remedies for violations of the Rehabilitation Act are to be found in Section 717 of Title VII or not at all. See *Lane*, 518 U.S. at 192-194.[5]

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[4] Petitioner's complaint does not refer to the Back Pay Act as a source of relief. See Complaint 1-2. Only after the district court awarded petitioner back pay in its Interim Judgment and the government asserted sovereign immunity against interest did petitioner seek further relief under the Back Pay Act.

[5] As petitioner notes (Pet. 14 n.6), some courts have held that a plaintiff can also sue the federal government for employment discrimination under Section 504 of the Rehabilitation Act. Title VI of the Civil Rights Act of 1964, rather than Title

By incorporating Title VII procedures and remedies in the Rehabilitation Act, Congress created a self-contained statutory scheme for claims of discrimination based on disability in the federal workplace. In fact, for federal employees who claim unlawful discrimination based on disability, the Rehabilitation Act provides its own set of administrative procedures. 29 U.S.C. 794a(a)(1), incorporating 42 U.S.C. 2000e-16(b) and (c). It creates a civil cause of action. 29 U.S.C. 791, 794a(a)(1); see *Lane*, 518 U.S. at 193. It includes a jurisdictional provision. 29 U.S.C. 794a(a)(1), incorporating 42 U.S.C. 2000e-5(f)(3). And, most important for present purposes, it specifies the remedies, including a back pay remedy, that are available under the Act. 29 U.S.C. 794a(a)(1), incorporating 42 U.S.C. 2000e-5(g).

Those detailed, specific and comprehensive provisions demonstrate that Congress did not intend Title VII and Rehabilitation Act plaintiffs to look to other statutes for their remedies. In *Brown* v. *General Services Administration*, 425 U.S. 820, 835 (1976), this Court held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." The Court rested that conclusion on

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VII, provides the remedial structure for *some* violations of Section 504. See 29 U.S.C. 794a(a)(2) (remedies of Title VI available for violations by "any recipient of Federal assistance or Federal provider of such assistance"). This Court made clear in *Lane*, 518 U.S. at 192-194, however, that Section 501, which incorporates Title VII's remedies, is the exclusive source of monetary relief in Rehabilitation Act actions against the federal government as employer. See 518 U.S. at 193 (waiver of sovereign immunity against monetary damage awards is only for "the narrow category of § 504 violations committed by federal funding agencies acting as such").

the "balance, completeness and structural integrity" of Title VII. See *id.* at 832. The Court reaffirmed the exclusivity of the Title VII remedial scheme in *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979), a case that is closely analogous to this one. In *Novotny*, the Court held that the rights created by Title VII could not be asserted within the remedial scheme of another statute, 42 U.S.C. 1985(3). Because Title VII includes its own cause of action and its own administrative and judicial remedies, see *id.* at 373-376, the Court held that the remedies of 42 U.S.C. 1985(3) are not available to a Title VII claimant.[6]

The present case is analogous. Through its incorporation of Title VII, the Rehabilitation Act provides its own exclusive back pay remedy. Thus, under *Brown* and *Novotny*, petitioner may receive only the remedies provided by the Rehabilitation Act.

Indeed, the provisions of Title VII relating to back pay illustrate why this Court has repeatedly recognized the exclusivity of the remedial scheme. The Title VII back pay remedy is more limited than that provided by the Back Pay Act. The Back Pay Act provides for back pay during the *entire* period of an unjustified personnel action. See 5 U.S.C. 5596(b)(1)

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[6] Contrary to petitioner's contention (Pet. 12), the decision in *Novotny* rested not only on a concern that plaintiffs might otherwise circumvent Title VII's administrative process but also on the concern that they might seek improperly to supplement its limited remedies. After observing that "[i]f a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of [Title VII's] detailed and specific provisions," the Court noted that, unlike Title VII, "Section 1985(3) expressly authorizes compensatory damages; punitive damages might well follow." 442 U.S. at 375-376.

(A). Title VII, in contrast, limits back pay to a period beginning no earlier than two years before the date that the employee files a complaint with the relevant federal agency. See 42 U.S.C. 2000e-5(g). It would make no sense for Congress to provide federal employees with a specific and limited back pay remedy under Title, VII and the Rehabilitation Act if Congress intended that prevailing federal employees under those anti-discrimination statutes would also be eligible to receive more generous back pay under the Back Pay Act. Accordingly, because Congress had not waived sovereign immunity for interest on Rehabilitation Act back pay awards until it passed the 1991 Civil Rights Act, petitioner is not entitled to interest on his back pay award until November 21, 1991.[7]

4. Petitioner argues (Pet. 10) that interest is nonetheless available under the Back Pay Act because he has met that statute's conditions—*i.e.*, he has been "found by appropriate authority under applicable law * * * to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of [his] pay." As demonstrated above, however, peti-

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[7] Although, as petitioner notes (Pet. 13-15), the Equal Employment Opportunity Commission formerly held a different view, the Commission no longer espouses that view. See 57 Fed. Reg. 12,641-12,642 (1992) (current regulations provide that interest is available only "where sovereign immunity has been waived," *e.g.*, by the Postal Service Reorganization Act or by Title VII for awards based on conduct after November 21, 1991). In any event, this Court grants certiorari to resolve conflicts among the courts of appeals or state courts, see Sup. Ct. R. 10(a), not to settle disagreements among federal agencies.

tioner's argument ignores basic sovereign immunity principles and the exclusivity of the Rehabilitation Act back pay remedy and thus must be rejected.

Petitioner's contention also ignores the relationship between the Back Pay Act and the anti-discrimination statutes. The Back Pay Act applies to cases in which federal employees challenge a personnel action under a collective bargaining agreement or the civil service laws. See *Roepsch* v. *Bentsen*, 846 F. Supp. 1363, 1371 (E.D. Wis. 1994) (Back Pay Act does not apply to civil rights violations; "[i]t makes no logical, historical, or interpretive sense to graft the provisions of the Back Pay Act onto the civil rights statutes"). Congress passed the Back Pay Act in 1966. See Pub. L. No. 89-380, 80 Stat. 94. As its language makes clear, the Back Pay Act was confined to "withdrawal[s] or reduction[s]" in pay. See 5 U.S.C. 5596(b)(1)(A). It did not, therefore, apply to large numbers of personnel actions—for example, discriminatory failures to promote—that today are forbidden by Title VII and other anti-discrimination statutes. See 5 U.S.C. 5596(b)(1); *United States* v. *Testan*, 424 U.S. 392, 406-407 (1976). At the time of the Back Pay Act's passage, Title VII did not apply to the federal government, and the Rehabilitation Act had not yet been enacted.

When it extended Title VII to the federal government, Congress created a self-contained, exclusive statutory scheme for claims of discrimination in the workplace. See *Brown v. GSA*, *supra*; *Novotny*, *supra*. And when Congress amended the Back Pay Act in 1987 to provide for interest, Congress did *not* provide for interest on all back pay awards against the United States but instead provided for interest only on those amounts payable under Section

5596(b)(1)(A)(i) of the Back Pay Act. See pages 8-9, *supra*. Because this Court had already decided *Brown* and *Novotny*, Congress presumably did not intend the Back Pay Act's interest provision to apply to Title VII or Rehabilitation Act awards. See *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34-35 (1995). Indeed, when Congress intended to provide for interest on back pay awards under Title VII and the Rehabilitation Act, it did so by expressly amending Title VII. See page 8, *supra*.

5. To support his argument that the requisite waiver of sovereign immunity can be found in the Back Pay Act, petitioner relies (Pet. 11-12) on *Loeffler* v. *Frank*, 486 U.S. 549 (1988). *Loeffler* is inapposite, however, because the separate statute that provided the waiver of sovereign immunity in that case was the Postal Reorganization Act. 486 U.S. at 554. The Postal Reorganization Act waives the United States' sovereign immunity with respect to actions against the Postal Service because it contains a "sue and be sued" clause. *Id.* at 556.

In *Loeffler*, the Court thus distinguished the Postal Service from other federal agencies, such as the Library of Congress in *Shaw* (and the SSA in this case), because in creating the Postal Service, Congress "cast off the cloak of sovereignty" and gave the Postal Service the "status of a private commercial enterprise." 486 U.S. at 565 (quoting *Shaw*, 478 U.S. at 317 n.5). Because Congress had "launched [the Postal Service] into the commercial world," the Court held that the *Shaw* "no-interest rule" was "inapplicable." *Id.* at 564-565. Because the government is not

operating a commercial venture through the SSA, *Loeffler* is inapplicable to this case.[8]

B. The Rehabilitation Act Does Not Waive Sovereign Immunity For Tax Enhancement Damages

Basic principles of sovereign immunity make clear that Congress did not waive the federal government's sovereign immunity for tax enhancements to compensate for adverse tax consequences suffered because of the delayed payment of salary under the Rehabilitation Act or Title VII. As this Court recently explained, "[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane*, 518 U.S. at 192. Because neither Title VII nor the Rehabilitation Act expressly authorizes tax enhancements, Congress has not waived the government's sovereign immunity for such monetary relief. *Nordic Village*, 503 U.S. at 34, 37; see *United States* v. *King*, 395 U.S. 1, 4 (1969) (a waiver of sovereign immunity for a particular

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[8] To be sure, *Loeffler* establishes that, under certain circumstances, a waiver of sovereign immunity contained in a separate statute can enlarge the scope of relief available against a federal agency under Title VII. But the waiver of immunity against interest in the Back Pay Act does not do so, for the reasons we have explained above: The waiver of immunity in the Back Pay Act applies only to awards under the Back Pay Act itself, and Title VII's remedial scheme may not be supplemented by the Back Pay Act's remedies. See pages 8-9 and 10-13, *supra*. Nothing in *Loeffler* casts doubt on either of those propositions. *Loeffler* did not involve the Back Pay Act at all, and the Court in *Loeffler* made clear that the plaintiff in that case was relying on the cause of action and remedies provided by Title VII itself. See 486 U.S. at 564-565.

remedy "cannot be implied but must be unequivocally expressed").[9]

Indeed, petitioner has failed to cite a single case in which a court has awarded a tax enhancement against the federal government under Title VII or the Rehabilitation Act. There is thus no reason for this Court to review the Eighth Circuit's decision. To the extent that there is any disagreement among the courts of appeals "over whether Title VII authorizes tax enhancements" against private defendants (Pet. 28), that disagreement is not presented by the decision in this case, because that decision is based solely on the sovereign immunity of the United States. See Pet. App. 57a.[10] Any uncertainty regarding whether tax enhancement damages are available against private parties only reinforces the correctness of the court of appeals' decision. As this Court has explained, the

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[9] Petitioner's assertion (Pet. 24) that "[t]he decision below conflicts with this Court's repeated admonition that Title VII makes the identical remedies available to public and private employees" is directly refuted by this Court's decision in *Shaw*, *supra*. In *Shaw* this Court held that Title VII did not waive the government's traditional immunity from interest, nor did it waive immunity from other methods of compensating for delay in the receipt of funds. 478 U.S. at 317-323. The tax enhancement damages that petitioner seeks in this case, like interest and like the "delay factor" at issue in *Shaw*, are "designed to compensate for the belated receipt of money," *id.* at 322, and are barred by sovereign immunity.

[10] Contrary to petitioner's suggestion (Pet. 28 n.17), the government did not take the position below that tax enhancement damages are unavailable in private party cases. In fact, the government relied on sovereign immunity principles and noted that the district court's discretion "in fashioning remedies to compensate victims of discrimination" (Pet. App. 47a) is limited in claims against the United States. See Gov't C.A. Br. 29.

fact that a statute can be plausibly read *not* to allow such monetary relief "is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." *Nordic Village*, 503 U.S. at 37.

It is therefore clear that Congress did not waive the sovereign immunity of the United States against tax enhancement damages under the Rehabilitation Act or Title VII.

II. THERE IS NO CLEAR CONFLICT IN THE CIRCUITS WITH RESPECT TO INTEREST ON BACK PAY AWARDS, AND, IN ANY EVENT, THE ISSUE HAS BEEN RESOLVED BY SUBSEQUENT LEGISLATION

Contrary to petitioner's suggestion (Pet. 16), the decision of the Eighth Circuit denying pre-1991 interest on back pay in this case does not stand in clear conflict with the decisions of other courts of appeals stating that the Back Pay Act waives sovereign immunity from interest on certain back pay awards under Title VII and the Rehabilitation Act. That proposition was not necessary to the holdings of the decisions cited by petitioner, and thus no clear conflict exists. Moreover, because Congress has expressly waived sovereign immunity for interest on back pay awards for periods after November 21, 1991, any apparent conflict relating to prior periods does not warrant this Court's review.

In *Brown* v. *Secretary of Army*, 918 F.2d 214, 218 (1990), cert. denied, 502 U.S. 810 (1991), the D.C. Circuit stated that "the Back Pay Act, to the extent of its coverage, waives the federal government's sovereign immunity against prejudgment interest on Title VII back pay awards." That statement, how-

ever, was not necessary to the decision of the case before the court. In *Brown*, the court held that the employee could not rely on the Back Pay Act for prejudgment interest because the Back Pay Act applies only to adverse personnel actions that reduce or withdraw an employee's pay, and not to the failure to promote an employee, which was the basis for the claim in that case. See 918 F.2d at 218-221.[11]

Without independent analysis, the Tenth Circuit followed the D.C. Circuit both in pronouncing that the Back Pay Act waived sovereign immunity for interest on back pay awards under Title VII and in finding the Back Pay Act inapplicable to the claim at hand. *Edwards* v. *Lujan*, 40 F.3d 1152, 1154 (10th Cir. 1994), cert. denied, 516 U.S. 963 (1995). And, in *Woolf* v. *Bowles*, 57 F.3d 407, 411 (1995), the Fourth Circuit, while declaring the Back Pay Act a waiver of immunity for prejudgment interest in some circumstances, followed *Brown* and *Edwards* in finding it inapplicable to the case at hand. Thus, the holdings of those three circuits—that the government was not required under the Back Pay Act to pay interest to the plaintiffs—do not conflict with the Eighth Circuit's decision in this case.

Moreover, since the *Brown* decision, relevant sovereign immunity law has developed in ways that make it unclear that the D.C. Circuit would still reach the same conclusion on the scope of the Back Pay Act. In *Brown*, the D.C. Circuit relied on *Loeffler* to support its conclusion that the requisite

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[11] Although, as petitioner notes, the D.C. Circuit reaffirmed *Brown*'s interpretation of the Back Pay Act in *Lee* v. *Baker*, 957 F.2d 912 (1992) (Table), *Lee* is an unpublished opinion, which cannot be cited as precedent. See D.C. Cir. R. 28(h).

waiver of sovereign immunity could be found in a statute other than Title VII. 918 F.2d at 216. But, as another panel of the D.C. Circuit recently recognized, since it decided *Loeffler*, this Court has clarified that the sue-and-be-sued clause in the Postal Reorganization Act "is a specific exception to the general rule that a waiver of sovereign immunity must be construed strictly in favor of the sovereign." *Department of Army* v. *FLRA*, 56 F.3d 273, 278 (D.C. Cir. 1995) (citing *Nordic Village*, 503 U.S. at 34). As this Court explained in *Nordic Village*, "[w]e have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress' clear intent, * * * as in the context of equally broad 'sue-and-be-sued' clauses." 503 U.S. at 34. Thus, contrary to the analysis in *Brown*, 918 F.2d at 216, it is now clear that the Back Pay Act does *not* waive sovereign immunity "just as the Postal Reorganization Act does," because the Back Pay Act does not contain an analogously broad waiver. See pages 8-9, 15-16 & n.8, *supra*.

Even if there were a true conflict among the holdings of the courts of appeals, review by this Court would not be warranted, because, after *Brown* was decided, Congress amended Title VII to waive expressly the federal government's sovereign immunity against prejudgment interest in Title VII and Rehabilitation Act cases. See page 8, *supra*. The D.C. Circuit, when it decided *Brown*, did not have the opportunity to consider that, when Congress wanted to waive sovereign immunity against interest on Title VII back pay awards, it did so expressly in Title

VII itself.[12] Moreover, because of the 1991 amendment, the Eighth Circuit's decision in the present case will have limited future impact. Any purported conflict among the courts of appeals will not affect whether interest is available in cases based on conduct occurring on or after November 21, 1991, the effective date of the amendment.

Petitioner implicitly acknowledges (Pet. 3, 20-21) the limited importance of the purported conflict for cases under Title VII and the Rehabilitation Act. He asserts (Pet. 3, 22-23), however, that "the division of authority created by the decision below * * * has substantial continuing import for age discrimination plaintiffs" because the Civil Rights Act of 1991 does not waive sovereign immunity from interest in Age Discrimination in Employment Act (ADEA) cases.

Petitioner's argument is unpersuasive. If the question of ongoing significance is the availability of interest on ADEA awards, the Court should grant review in an ADEA case to resolve that question. Although the United States believes that interest is not available on awards under the ADEA for the same reasons that it was unavailable under Title VII and the Rehabilitation Act before the 1991 Act, there are differences between the remedial provisions of the ADEA and Title VII. Most notable is the difference upon which petitioner relies: the 1991 Act specifically provides for interest in Title VII and Rehabilitation Act cases but does not provide for interest in cases brought under the ADEA. Rather than granting

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[12] Although the Tenth Circuit decided *Edwards* and the Fourth Circuit decided *Woolf* after the 1991 Act, those courts did not engage in any independent analysis of the relevant issue, as we explained at page 19, *supra*.

review in the present Rehabilitation Act case, this Court should therefore await the possible development of a conflict among the courts of appeals on the availability of interest in ADEA cases.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[13] Petitioner's argument (Pet. 20-21) that certiorari is warranted because, in Title VII and Rehabilitation Act cases arising from conduct prior to November 21, 1991, federal agencies do not award interest in the administrative process, while some courts have held that interest is available, suffers from the same defects. Under the Civil Rights Act of 1991, both the administrative and judicial branches may award prevailing plaintiffs interest in Title VII and Rehabilitation Act cases that arise on or after November 21, 1991.